No. 12692

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PALOMAS LAND AND CATTLE COMPANY, a Corporation,
Appellant,

vs.

ARTHUR D. BALDWIN, as Surviving Trustee Under a Certain Agreement of Trust Dated October 29, 1943; LOUIS A. SCOTT, JOHN L. RASBERRY and JAMES F. HULSE, Partners Doing Business Under the Firm Name and Style of Burges, Scott, Rasberry & Hulse,
Appellees.

APPELLANT'S OPENING BRIEF.

On Appeal From the United States District Court for the Southern District of California Central Division

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FILED

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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ARTHUR D. BALDWIN, as Surviving Trustee Under a Certain Agreement of Trust Dated October 29, 1943; LOUIS A. SCOTT, JOHN L. RASBERRY and JAMES F. HULSE, Partners Doing Business Under the Firm Name and Style of Burges, Scott, Rasberry & Hulse,
Appellees.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

Action in interpleader brought by plaintiff, a citizen of Ohio, under provisions of Section 1335 of Title 28, U. S. C. A. (herein for convenience called "the Act") seeking to interplead Appellant, a California corporation, and the other defendants, citizens of Texas [Complaint par. I, Tr. pp. 2-3] with respect to the sum of $5,488.11, deposited by plaintiff with registry of the United States District Court, Southern District of California, Central Division. [Complaint par. VII, Tr. p. 6.] Appeal taken under provisions of Section 1292(1) and Section 1294(1) of Title 28, U. S. C. A. from orders of District Court permanently enjoining prosecution of any other action against plaintiff in any other court, dismissing plaintiff from action with costs and attorney's fees, and directing interpleader.

STATEMENT OF THE CASE.

I.

Questions Raised by the Appeal.

1. MAY A TRUSTEE, ACTING AS SUCH UNDER AN UNAMBIGUOUS EXPRESS TRUST AND BY VIRTUE OF THE ATTORNEY-CLIENT RELATIONSHIP, FORCE HIS BENEFICIARY-CLIENT TO INTERPLEAD WITH A HOSTILE CLAIMANT TO THE BENEFICIARY-CLIENT'S TRUST FUNDS?

2. WHERE BOTH THE PLAINTIFF TRUSTEE IN INTERPLEADER AND THE ADVERSE CLAIMANT TO DIRECT PAYMENT OF THE TRUST FUNDS HAVE ACKNOWLEDGED THAT DIRECT PAYMENT IS IMPROPER, MAY THE CLAIM NONETHELESS BE MADE THE BASIS OF SUIT UNDER THE ACT?

3. MAY A TRUSTEE WHO FOR ALMOST THREE YEARS CONCEALS FROM HIS BENEFICIARY AN ADVERSE CLAIM TO THE TRUST FUNDS, NOW FORCE HIS BENEFICIARY TO INTERPLEAD WITH THE ADVERSE CLAIMANT?

4. WHERE SPECIFIC LANGUAGE OF AN EXPRESS TRUST FORBIDS ANY EXPENSE OR CHARGE WITHOUT PRIOR WRITTEN APPROVAL OF THE BENEFICIARY, AND THE APPLICABLE LAW BARS ATTORNEY'S FEES, MAY A TRUSTEE BRINGING AN INTERPLEADER ACTION AGAINST THE WILL OF THE BENEFICIARY BE AWARDED ATTORNEY FEES AND COSTS OUT OF THE TRUST FUND?

Appellant contends that each of the foregoing questions must be answered in the *negative,* that a negative answer to any one of the first three questions is decisive of the appeal in favor of Appellant, and that accordingly, the orders of the District Court should be reversed with directions to dissolve the injunction, dismiss the action, and order the return of the attorney's fees and costs.

II.

The Facts.[1]

1. Origin of the Attorney-Client Relationship and the Trust Funds.

Plaintiff and his former and present partners have been attorneys for Appellant since some time in 1923 in connection with Appellant's claims filed with the United States Government arising from expropriation of land by the Government of Mexico. [Tr. p. 69.] Some time in 1940 the defendant John L. Rasberry[2] became an attorney for Appellant, and was associated "to some extent" with plaintiff in pressing said claims. [Tr. p. 70.] The president of Appellant and sole owner of its stock at this time was Marshall B. Stephenson.[3] [Tr. p. 70.]

2. The Award to Appellant.

Pursuant to the Settlement of Mexican Claims Act of 1942 (56 U. S. Stat. at Large, Part 1, p. 1058, Chap. 766, Dec. 18, 1942), the General Claims Commission on June 15, 1943, published an award to Appellant totaling $1,686,-056.00. [Tr. pp. 70, 71.] The award became final on

---

[1]Except where otherwise specifically indicated, the facts pertinent to the determination of this appeal are taken from plaintiff's own affidavit and the exhibits attached thereto.

[2]The defendants "Louis A. Scott, John L. Rasberry, and James F. Hulse, Partners Doing Business Under the Firm Name and Style of Burges, Scott, Rasberry & Hulse" as well as their law firm are sometimes for convenience referred to as "the defendant Rasberry," who was the active participant in the events leading up to the present litigation.

[3]Stephenson was married to Letha L. Stephenson (now Letha L. Metcalf), who, upon his death May 11, 1946, became president of Appellant [Affidavit of John L. Rasberry, Tr. p. 30], and sole owner of its stock [*ibid.*, Tr. p. 39].

August 26, 1943. [Tr. p. 72.] To permit collection Appellant executed a power of attorney, which was filed with the Commission [Tr. pp. 72, 73], and on September 20, 1943, plaintiff's law firm received a U. S. Treasury check for $480,525.96, 30% of the award. [Tr. p. 73.]

3. The Trust Agreement.

The next day, September 21, 1943, another claimant to the funds filed suit in the District of Columbia and in Los Angeles. [Tr. p. 73.] The suits were settled by the Trust Agreement dated October 29, 1943 [Tr. p. 74; Ex. No. 1, Tr. pp. 84-91], Rasberry acting as counsel for Appellant in the negotiation and preparation of the Agreement.

The vital portion of the Agreement reads as follows [Tr. pp. 86-87.]

> "Palomas and Bank shall, and do hereby, assign, transfer and set over unto the Trustees all of their respective rights, titles and interests in and to said award (including all sums paid or payable on said award), in trust nevertheless, and the Trustees shall, and hereby covenant and agree to, hold the same, together with all their rights, titles and interests in and to said award (including all sums paid or payable on said award), in trust for the following purposes:
>
> "(a) To collect, receive and receipt for all sums paid or payable on said award and the Trustees shall have full power so to do;
>
> "(b) To promptly, upon receipt of any sums paid or payable on account of said award, disburse the same as follows:
>
> "A seven-nineteenths (7/19ths) part to Palomas;
>
> "A seven-nineteenths (7/19ths) part to Bank;

"The remaining five-nineteenths (5/19ths) part to Garfield, Baldwin & Vrooman, (the Trustees).[4] Pending actual disbursement of said funds by the Trustees, as above provided, the Trustee shall maintain the same in a trust account with the Cleveland Trust Company of Cleveland, Ohio, or with some other responsible bank or trust company. The Trustees shall execute this trust without charge. No expenses shall be incurred without first obtaining the written approval of Palomas and Bank. The Trustees shall not make or permit any substitution under any power of attorney heretofore or hereafter given them to enable them to effect collection of sums payable on said award without first causing the substitute to execute an undertaking to hold all funds coming to his hands in trust for the purposes and on the terms and conditions herein set forth."

4. Disposition of Trust Funds Before the Lawsuit.

Installments on the award as collected by plaintiff and disbursed to Appellant pursuant to the Trust Agreement have been as follows:

(A) First Installment. On December 17, 1943, plaintiff's firm made its trustee check to Appellant in the sum of $177,035.88. [Tr. p. 100.] Of that total, Appellant paid $26,555.38 to the defendant Rasberry's law firm. [Ex. "C" to Rasberry Affidavit, Tr. p. 53.]

(B) Second Installment. On January 10, 1944, defendant Rasberry requested plaintiff's firm to make future checks payable to Appellant and Rasberry's

---

[4]Plaintiff's firm was originally handling the matter on a 33 1/3% contingency. [Tr. pp. 97-98.]

firm "as we have a contingent interest in the proceeds". [Tr. p. 101.] On October 25, 1945, plaintiff's firm made its trustee check to Appellant and defendant Rasberry's law firm, "its attorneys", in the sum of $59,011.96. [Tr. p. 104.] Of that total, Appellant paid $8,851.79 to the defendant Rasberry's law firm. [Affidavit of John L. Rasberry, Tr. p. 38.]

(C) Third Installment.

(1) Rasberry's First Attempt to Get Direct Payment From Trustee.

Between the payment of the Second and Third Installments, Marshall B. Stephenson died (May 11, 1946). "In connection with the obtaining of the requisite signatures [of Appellant] to the voucher to be forwarded to the Treasury Department of the United States in order to obtain said third installment" [Tr. pp. 75-76], plaintiff's law firm received in one envelope [Tr. p. 76] two letters from defendant Rasberry, which because of their impact on this litigation are reproduced here in full:

"May 31, 1947

"Dear Mr. Garfield:

"I received in due time your letter of May 26, 1947, enclosing Voucher (Form 406 Treasury Department) covering the third installment on the Palomas General Mexican Claim of 6.5%, the net proceeds of which appear to be $104,113.96. Since Marshall's death, his widow, Letha L. Stephenson, who now lives in California, has been President of the company. However, P. W. Pogson is Vice-President and Percy W. Pogson, Jr., is Secretary-Treasurer. We were therefore able to complete the voucher at El

Paso and now enclose the same to you herewith duly executed.

"As you know, our firm is entitled to 15% of the proceeds due Palomas Land and Cattle Company as attorney's fees. Accordingly, for convenience, we respectfully request that in disbursing the amount due Palomas Land and Cattle Company you make two checks, one for 15% of the amount, payable to this firm, and one for the balance payable to Palomas Land and Cattle Company.

"With kind personal regards and best wishes, beg to remain

"Yours sincerely,

/s/ J. L. RASBERRY,
J. L. RASBERRY."

[Ex. No. 10, Tr. pp. 107-108.]

"May 31, 1947

"Confidential

"Dear Mr. Garfield:

"You will note my request in the attached letter that you divide the portion to which Palomas is entitled into two parts, one for our attorney's fee of 15% and the other for the balance. We have no objection to the check evidencing our attorney's fees being payable to Palomas Land and Cattle Company as joint payee, but we do desire our firm named as a payee therein. In support thereof, we attach hereto photostat copy of our contract with Palomas Land and Cattle Company for your records and so that you, as Trustee, are advised of our interest in the portion belonging to Palomas Land and Cattle Company. We do not anticipate any argument about the matter for our portion thereof was paid without question during

Marshall's lifetime. However, Marshall is dead and something may happen to me. *Therefore, I want to get this set up so that there is a record thereof on file with you and so that our attorney's fees can be segregated by the Trustees.*[5]

"My wife and I plan to attend the meeting of the American Bar Association in Cleveland in September of this year and we are looking forward to seeing you at this time.

"With kind personal regards and best wishes, beg to remain

Yours sincerely,

/s/ J. L. RASBERRY,
J. L. RASBERRY."

[Ex. No. 11, Tr. pp. 108-109.]

(2) THE ALLEGED EQUITABLE ASSIGNMENT TO RASBERRY.

The alleged contract enclosed in the "Confidential" letter read as follows:

"August 6, 1943.

"Burges, Burges, Scott, Rasberry & Hulse, El Paso, Texas.

"Confirming our verbal agreement, the undersigned hereby employs you to prosecute and assert the claims of undersigned to any award made to undersigned under the provisions of the convention between the United States of America and Mexico, dated November 19, 1941, and Public Law 814 adopted by the 77th Congress of the United States, and to defend any claims asserted to any such award by Ben Wil-

[5]Emphasis supplied here and elsewhere in Appellant's Brief.

liams, *et al,* and the Security-First National Bank of Los Angeles. Undersigned agrees to pay you for any services rendered in this connection as follows:

"1. Should the matters in controversy be settled by agreement prior to the filing of any suit by undersigned or the parties named, you shall receive 5% of any sums realized by undersigned or either of them.

"2. Should the matters in controversy be disposed of by litigation or settled by agreement after the filing of any suit or legal procedure by undersigned or the other claimants mentioned, you shall receive 15% of all sums realized by undersigned or either of them.

"3. It is understood that in arriving at your fee, any sum deducted from the award by the law firm of Garfield, Baldwin & Vrooman or ultimately allowed them for the prosecution of such claims before the Mexican Claims Commission shall not be taken into consideration in arriving at the sums realized by undersigned.

"4. It is also understood that undersigned shall pay all expenses incurred by you in the handling of this matter. including traveling expenses, telephone and telegraph bills, etc., and the fees of any out of state attorney or attorneys whom you may deem it necessary to employ for the purpose of prosecuting or defending any litigation instituted outside of the State of Texas to protect the undersigned.

"Yours very truly,

PALOMAS LAND AND CATTLE COMPANY
"By /s/ MARSHALL B. STEPHENSON,
President.

HUECO CATTLE COMPANY
"By /s/ MARSHALL B. STEPHENSON
President.

"Approved:

"Burges, Burges, Scott,
Rasberry & Hulse,
"By /s/ J. L. Rasberry."

[Tr. pp. 110-111.]

(3) Trustee Refuses Rasberry's Request for Direct Payment.

In response to Rasberry's request for direct payment, plaintiff trustee advised Rasberry under date of June 3, 1947:

"Relative to the disbursement of the proceeds of the voucher: You will recall that the distribution of the funds is to be made in accordance with the terms of the contract of October 29, 1943, by and between Palomas Land and Cattle Company, Security-First National Bank of Los Angeles, and the partnership of Garfield, Baldwin & Vrooman." [Tr. p. 112.]

(4) Rasberry Acknowledges Correctness of Trustee's Refusal.

Defendant Rasberry took the Trustee's refusal of direct payment in good grace, replying on June 4, 1947:

"I do, of course, recall that the distribution of the funds is to be made in accordance with the terms of the contract of October 29, 1943. However, my confidential letter accompanying the voucher will explain our position and of course so long as Palomas Land and Cattle Company is joint payee in the check

evidencing our attorneys' fees you are taking no responsibility for the matter. In any event, we will appreciate your handling the matter in the manner suggested." [Tr. pp. 113-114.]

(5) Check to Appellant and Rasberry.

On July 1, 1947, plaintiff made its first disbursement of trust funds since the death of Stephenson. On that date plaintiff sent two checks to defendant Rasberry, one payable to Appellant in the sum of $32,-604.11, the other payable jointly to Appellant and defendant Rasberry's firm, "its attorneys", in the sum of $5,753.66, to wit, 15% of Appellant's share. [Tr. pp. 114-116.] Plaintiff's letter of transmittal made the following comment on the new plan of disposition:

"The two checks representing the Palomas Land and Cattle Company's share, are enclosed, and I trust that the manner of issuance will meet your requirements. Since the Vice President and Secretary-Treasurer signed the voucher, it might be desirable to ask that the endorsement of the check by the Palomas Land and Cattle Company carry the signatures of both of those officers on the check which has been made payable to your firm and Palomas. If you see any objection to such procedure, I shall be glad to hear from you regarding it. I am acting in Mr. Garfield's absence, and, of course, wish to do all that is necessary to insure for the disposition of the funds in accordance with the Agreement." [Tr. p. 115.]

(D) Fourth Installment. In transmitting the voucher for the fourth installment, defendant Rasberry wrote plaintiff in part as follows:

"As you know, our firm is entitled to 15% of the proceeds due Palomas Land and Cattle Company as attorney's fees. Accordingly, *for convenience,* we respectfully request that in disbursing the amount due Palomas Land and Cattle Company you make two checks, one for 15% of the amount, payable to this firm and the Palomas Land and Cattle Company, and one for the balance payable to the Palomas Land and Cattle Company." [Tr. p. 119.]

On March 4, 1948, plaintiff made its second disbursement of trust funds since the death of Mr. Stephenson and its second disbursement by two (instead of one) checks, one payable to Appellant in the sum of $30,096.09, the other payable jointly to Appellant and defendant Rasberry's firm, "its attorneys", in the sum of $5,311.08. [Tr. pp. 120-122.]

(E) Fifth Installment. On transmitting the voucher for the fifth installment, defendant Rasberry repeated the formula used in connection with the fourth installment, requesting two checks *"for convenience."* [Tr. p. 125.]

On February 4, 1949, plaintiff transmitted two checks to defendant Rasberry—one payable to Appellant in the sum of $32,102.51, the other payable jointly to Appellant and defendant Rasberry's firm, "its attorneys" in the sum of $5,665.14. [Tr. pp. 127-130.]

5. Dispute Over the Sixth Installment.

(A) Rasberry's Third Request for Two Checks "For Convenience."

As he had done in connection with the fourth and fifth installments, defendant Rasberry requested plaintiff to make disbursement of the proceeds of the sixth installment to plaintiff in two checks, one to plaintiff and one to plaintiff and defendant Rasberry's firm jointly—this, *"for convenience."* [Tr. p. 133.] The Pogsons, father and son, who had been executing the payment vouchers in Texas since the death of Marshall Stephenson, were now no longer officers of Appellant, and for the first time it became necessary for Mrs. Letha Metcalf (president of Appellant) personally to be consulted to obtain the requisite signatures. [Tr. pp. 134-137.] Defendant Rasberry advised plaintiff of this circumstance by letter dated January 3, 1950. [Tr. pp. 80, 81, 132-137.]

(B) Appellant Demands Payment in Accordance With Trust Agreement.

On January 20, 1950, plaintiff received a letter from counsel for Appellant, Roland Rich Woolley, enclosing the executed voucher for the sixth installment, and likewise a letter from Appellant directing payment to it and no other of Appellant's 7/19 share of monies under the Trust Agreement. Appellant further advised plaintiff that any sum to be paid defendant Rasberry's firm would be paid by Appellant direct and that Roland Rich Woolley was its sole legal representative. [Tr. pp. 81, 82, 138-143.]

(C) Defendant Rasberry Requests Continuation of Two Check Disbursement.

On January 23, 1950, defendant Rasberry asked for "consideration" from the Appellant's trustee, writing plaintiff in part:

"In view of the question raised as to our attorneys' fee, I have an idea, although Mrs. Metcalf does not so state, that she has instructed you to forward Palomas' part of the award, as well as all vouchers in the future, direct to Palomas, c/o Mr. Woolley. While I feel certain that you will do so in any event, *I respectfully request, under the circumstances, that you continue disbursing the amount due Palomas Land and Cattle Company in two checks, one for 15% of the amount, payable to this firm and Palomas Land and Cattle Company, and one for the balance payable to Palomas Land and Cattle Company. It is my plan to forward both checks to a bank in Los Angeles with instruction to deliver Palomas' part of the award upon endorsement of our check for 15%. I am afraid that if this isn't done, payment of our part will be delayed. Please also continue to send us the vouchers in order that we may in turn forward them, for I want to keep advised of the situation at all times. I feel that we are due this consideration, both because I have previously furnished you with a copy of the agreement setting apart 15% of all sums realized by Palomas to us as attorney's fees, but also because as attorney who represented Palomas, I have a lien on this award for our attorney's fees.*

"I will very much appreciate your co-operation.

"With kind personal regards and best wishes, beg to remain

Yours sincerely,"

[Tr. pp. 144-145.]

(D) Finale.

(1) *"Equitable Assignment."*

In a further exchange of correspondence with Roland Rich Woolley, plaintiff's firm advised that they had "construed [the alleged letter agreement of August 6, 1943 [Tr. pp. 110, 111]] to constitute an equitable assignment in the recovery of the claim. We have no other document in the form of an assignment." [Tr. p. 152.]

(2) *Rasberry's "Demand."*

On *February 6, 1950,* plaintiff's firm in Ohio received a letter from Defendant Rasberry in Texas [Tr. p. 83] dated *February 6, 1950,* reading as follows [Tr. pp. 155, 156]:

"Supplementing my letter of January 31, 1950, and in further response to your letter of January 26, 1950 [neither of these letters are attached to either the plaintiff's or Rasberry's affidavits] beg to formally demand that the Trustees, James R. Garfield and Arthur D. Baldwin, under no circumstances deliver our 15% part of the proceeds realized by Palomas Land and Cattle Company from the above claim to the Palomas Land and Cattle Company but, on the contrary, we must insist that our part of these proceeds be paid over and delivered to us by the Trustees.

"It is our position that the contract dated August 6, 1943, photostat copy of which has heretofore been furnished you, *entitles us to the delivery of these funds direct to us.*

"For your further information, Mrs. W. H. Burges, widow of our deceased partner, W. H. Burges, and Jane Burges Perrenot, daughter of our deceased partner, Richard F. Burges, as well as the surviving members of the partnership, to wit, Louis A. Scott, J. L. Rasberry and J. F. Hulse, have an interest in the 15% attorney's fee provided for by the contract mentioned.

"With kind personal regards and best wishes, beg to remain

"Yours sincerely,"

(3) *Suit Filed.*

After a further letter from Roland Rich Woolley requesting information as to the dealings between plaintiff and the defendant Rasberry [Tr. pp. 157-161], plaintiff's firm announced their intention of filing the present action, saying in part:

"Under the Federal Interpleader Act we could file an action in either the District Court of Los Angeles or El Paso. Recognizing Palomas Land and Cattle Company as our client and the Rasberry firm as a claimant of part of the funds of such client, we have determined to file this action in the District Court of Los Angeles." [Tr. p. 163.]

Under date of March 13, 1950, plaintiff disbursed to Appellant its share of the sixth installment minus 15% ($5,488.11 [Tr. pp. 164, 165], which latter sum was paid into the Registry of Court on the filing of this action March 30, 1950. [Tr. pp. 7, 9.]

Specification of Error.

1. The District Court should have held as a matter of law that Plaintiff, trustee of Appellant's funds with a fiduciary duty to pay those funds to Appellant—both under an express trust and by virtue of the relationship of attorney and client between plaintiff and Appellant—cannot withhold Appellant's funds and by filing suit under the Act, force his beneficiary and client to interplead with a hostile claimant to the trust funds.

Accordingly, the District Court erred in:

(a) Permanently enjoining and restraining Appellant from any suit against Plaintiff to recover the wrongfully withheld trust funds [Concl. of Law VI, Tr. p. 194; Injunction, par. 2, Tr. p. 198];

(b) Ordering Appellant to litigate title to Appellant's trust funds with the other defendant [Concl. of Law II, Tr. p. 193; Injunction, par. 3, Tr. p. 198];

(c) Discharging Plaintiff from the action [Concl. of Law III, Tr. p. 193, Injunction, par. 4, Tr. p. 198], refusing to dismiss the action [Injunction, par. 1, Tr. p. 198], and retaining jurisdiction of the cause [Concl. of Law IV, Tr. p. 194; Injunction, par. 6, Tr. p. 199];

(d) Finding that the withholding of the beneficiary-client's money and deposit of the same in the registry of the District Court constituted neither breach of trust nor violation of fiduciary duty. [Finding of Fact VIII, Tr. pp. 192, 193.]

2. The District Court should have found:

(a) That almost three years before filing of this suit, the other defendant requested payment of attorney's fees allegedly owing by Appellant to be made from the trust funds directly by the trustee—the same contention that is the basis of the present action;

(b) That at the time the plaintiff had the same knowledge of the alleged agreement of August 6, 1943, between Appellant and the other defendant which plaintiff had at the time of the filing of the action;

(c) That at the time, the plaintiff rejected the request for direct payment as being contrary to the Trust Agreement;

(d) That at that time, the other defendant in this action acknowledged that direct payment was improper;

(e) That the other defendant has never contended that said alleged letter agreement of August 6, 1943, constituted a legal assignment of any portion of trust funds;

(f) That plaintiff did not in fact believe that said alleged agreement constituted an equitable assignment;

(g) That the other defendant never at any time "demanded" (as distinguished from a mere "request") direct payment of 15% of Appellant's share

of the trust funds until shortly before the suit was filed, and following an exchange of letters between plaintiff and the other defendant, neither of which letters either plaintiff or the other defendant produced in evidence.

The District Court accordingly erred in finding:

(i) That defendant Rasberry contends that the alleged letter agreement dated August 6, 1943, constituted an assignment cognizable either *in law* or in equity [Finding of Fact IV, Tr. p. 190];

(ii) That such contention is tenable [Finding of Fact IV, Tr. p. 190];

(iii) That the claims of the defendant Rasberry have been asserted in good faith [Finding of Fact VII, Tr. p. 192];

(iv) That plaintiff could not safely determine for himself which claim is right [Finding of Fact VII, Tr. p. 192];

(v) That plaintiff could not pay Appellant without incurring risk of liability to the other defendant [Finding of Fact VII, Tr. p. 192];

(vi) That plaintiff at the time of the commencement of this action was and since has been in danger of being harassed and damaged by the costs of litigation and risk of liability in two actions on a single obligation;

3. The District Court should have found:

(a) That the plaintiff-trustee had knowledge of the other defendant's claim adverse to the Appellant-beneficiary for almost three years prior to the filing of the suit;

(b) That the plaintiff-trustee concealed that knowledge and failed to inform Appellant of the adverse claim during all of that period;

(c) That such inaction on the part of plaintiff constituted a breach of his fiduciary duty to keep his beneficiary informed.

Accordingly, the District Court should have held, that having incurred an independent liability to Appellant by reason of such breach of fiduciary duty, the trustee cannot now withhold Appellant's funds and force his beneficiary to interplead with a stranger to the trust.

4. The District Court should have found that neither Appellant nor the other beneficiary of the trust ever consented in writing or otherwise to the institution of the present suit and should have held as a matter of law that the language of the trust instrument, to-wit: "The trustee shall execute this trust without charge. No expenses shall be incurred without first obtaining the written approval of Palomas and Bank," prohibited charging the trust funds with plaintiff's attorney's fees and costs of suit; that the law of California governs the award of attorney's fees, and that California law forbids an award of attorney's fees to the plaintiff in interpleader.

The District Court accordingly erred in finding that plaintiff at no time made any claim to the deposited funds [Finding of Fact VII, Tr. p. 192], and erred in awarding plaintiff attorney's fees and costs in connection with this action. [Concl. of Law V, Tr. p. 194; Injunction, par. 5, Tr. p. 198.]

ARGUMENT.

I.

Summary.

1. Trustee May Not Interplead Beneficiary and Stranger.

The fundamental duty of a trustee and attorney is loyalty to his beneficiary and client. The fundamental purpose of the law of trusts is protection of the beneficiary. That duty is violated and that purpose is subverted if the trustee-attorney is permitted to interplead his beneficiary-client with a hostile claimant to the beneficiary-client's trust funds. A trustee in honest doubt as to whom to pay may petition for instructions, in which case he remains before the Court. But, in deciding this matter of first impression, principle requires a holding that the trustee (unlike an insurer) may not abandon trust and beneficiary by forcing interpleader against the wishes of the beneficiary he is pledged to protect.

2. Action Not Brought in Good Faith.

The sole alleged justification for the interpleader is that a hostile claimant under an alleged equitable assignment claims a right to be paid *directly* by the plaintiff trustee a portion of funds admittedly payable to the beneficiary under the terms of an express trust. Yet prior to the filing of suit, the trustee refused the same claimant's request for such direct payment on the ground it would be contrary to the terms of the trust. And the hostile claimant acknowledged that direct payment was improper. Under such circumstances, the action cannot

be maintained for it cannot be said that there is any *bona fide* doubt as to the proper disposition of the funds in dispute.

3. Plaintiff Has "Unclean Hands."

In violation of his duty of communicating information to the beneficiary, the plaintiff-trustee respected the improper confidences of the adverse claimant and for almost three years concealed from the beneficiary knowledge that the beneficiary's trusted attorney was asserting an interest adverse to the beneficiary. Under such circumstances, a court of equity will not raise its hand to assist the wrongdoing trustee.

4. Award of Attorney's Fees and Costs Improper.

Where the action is improperly brought an award of attorney's fees and costs would be erroneous in any event. But in the instant case express language of the trust agreement forbids any charge or expense against the trust estate without the written consent of both beneficiaries. There is an entire absence of evidence of such consent. Finally, any right to attorney's fees of a plaintiff in federal interpleader is governed by the state law of the forum, and California law expressly bars the award.

II.

Plaintiff as Trustee of Appellant's Funds, With a Fiduciary Duty to Pay Those Funds to Appellant —Both Under an Unambiguous Express Trust and by Virtue of the Attorney-Client Relationship—Cannot Withhold Appellant's Funds and by Filing Suit Under the Act Force His Beneficiary and Client to Interplead With a Hostile Claimant to the Trust Funds.

1. Case of First Impression.

It is believed that the precise point here raised is one of first impression. Diligent research has failed to reveal any case squarely in point.[6] It is further believed that the fundamental principle involved, to wit: The fierce loyalty required of trustee and attorney to beneficiary and client—is so far assumed in our jurisprudence, that litigation has been unnecessary to establish the rightness of Appellant's contention.

2. Distinguishable Situations.

(a) It is well established that the mere fact that the plaintiff in interpleader or in bills in the nature of interpleader is bound to one of the defendants by contractual relationship, *e. g.,* the ordinary case of the interpleading insurer, does not bar the action. It need only be stated that the parties to an ordinary contract deal at arm's length and are not burdened with the fiduciary duty of loyalty that is shouldered by the trustee and attorney.

(b) There are numerous cases of interpleader brought by *executors and administrators.* (*E. g., Fox v. Sutton,*

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[6]See articles in 54 Am. Jur. 437, "Trusts," Sec. 560; 152 A. L. R. 1122; 144 A. L. R. 1174; 97 A. L. R. 996.

127 Cal. 515, 59 Pac. 939 (1900).) But in such cases, the plaintiff—while bearing certain fiduciary duties to legatees or other beneficiaries of the estate—is primarily an officer of the court, deriving his authority to act from and accountable to the Court which issues him letters. As stated in one interpleader case:

> "The administrators are primarily concerned with charges against the estate, and the proper collection of its assets."
>
> *Steele, et al. v. First National Bank of Mobile, et al.,* 233 Ala. 246, 171 So. 353, 355 (1936).

(c) Interpleader may be brought by a trustee against a stranger to the trust and a *consenting beneficiary.*

> *Security Trust Co., etc. v. Woodward, et al.,* 73 Fed. Supp. 667 (D. C., S. D., N. Y., 1947).

But since *volenti non fit injuria,* the problem here considered is not raised.

(d) Similarly, it would seem that interpleader may be permitted to obtain a construction of the trust instrument, where the controversy is *within the family* of trustee, settlor, and beneficiary, no question arising in such instance of the trustee's duty of loyalty to his trust as opposed to strangers.

See:

> *Blackmar v. Mackay, et al.,* 64 Fed. Supp. 48 (D. C., S. D., N. Y., 1946).

(e) Finally, there are cases of attempted interpleader by a trustee against his beneficiary and a *stranger claiming under a paramount title.* Here the asserted right of the trustee to interpleader is denied on the ground so well stated in *Campbell v. Trust Co. of Georgia, et al.,* 197 Ga. 37, 28 S. E. 2d 471, 472 (1943):

> *"The trustee must defend the title held by it under the trust indenture against the* [*adverse*] *claim whereever and however it is made."*

Such a situation, while strongly persuasive and closely related in principle to the instant case, is not identical—for here the assertion (erroneous though it be) is that the other defendant claims by equitable assignment from the beneficiary, who denies the claim.

3. The Federal Interpleader Act.

The Act (28 U. S. C. A., Sec. 1335) is remedial. See *Rossetti, et al. v. Hill, et al.,* 162 F. 2d 892 (C. C. A. 9th, 1947). It was not intended to change substantive legal relationships "but merely *extends the jurisdiction of federal courts* to the circumstances described in the Act." (*Danville Building Assn. etc. v. Gates, et al.,* 66 Fed. Supp. 706, 709 (D. C., E. D. Ill., 1946).) Accordingly, the question of the personal incapacity of a trustee-attorney to interplead his beneficiary-client with a hostile claimant is determined not by a meeting of the jurisdictional requirements of interpleader under the Act, but by reference to the substantive law prescribing the duties of trustee and attorney to beneficiary and client.

4. Trustee's Duty of Loyalty.

(a) *"This is one of those unfortunate cases which occasionally come before me, where trustees for one purpose think it their duty to act as trustees for other persons who are not their cestuis que trust."*

> *Smith v. Bolden,* 33 Beav. 262, 263, 55 Eng. Rep. 368, 369 (1863).

With that classic understatement, Sir John Romilly, Master of the Rolls, succinctly castigated a would-be interpleading trustee in language that is equally apropos to the plaintiff in the instant action.

The facts of the *Smith* case were these:

A trustee refused to deliver his deceased beneficiary's property to the beneficiary's administratrix as required by the trust. Reason for the refusal: There was a doubt in the trustee's mind as to whether the beneficiary had not in fact transferred the trust property to third persons by will. On being sued by the beneficiary's representative, the trustee expressed his willingness to pay the property into court upon a joinder in the action of all others having "bona fide claims."

In rejecting the trustee's proferred interpleader the Court adds to the statement above quoted:

> "The rights of the legatees under Hall's [the beneficiary's] will, are quite foreign to his trusteeship. If such a course of proceeding were allowed, the whole trust fund might be frittered away in costs.
>
> "I have no option. I must direct the defendant to pay the one-seventh to the legal personal representa-

tive of Henry Hall, and, as the defendant has been the occasion of the suit, he must pay the costs."

Smith v. Bolden, supra, at Beav. p. 264, Eng. Rep. p. 369.

In the instant case, as in the *Smith* case, it is not questioned that under the clear language of the trust, the trustee's duty is to pay the funds to the beneficiary. [See Complaint, par. II, Tr. p. 3.] In the instant case, as in the *Smith* case, it is alleged that third parties have "bona fide claims" to the beneficiary's funds, and that the trustee is in doubt as to whom to pay. [Complaint, par. VI, Tr. p. 5.] But in this case, as in the *Smith* case, the trustee has forgotten that he is bound to the beneficiary by an inviolable fiduciary obligation paramount to personal consideration or to consideration for strangers to the trust.

"The most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty. This duty is imposed upon the trustee not because of any provision in the terms of the trust but because of the relationship which arises from the creation of the trust. A trustee is in a fiduciary relation to the beneficiaries of the trust. There are other fiduciaries such as guardians, executors or administrators, receivers, agents, attorneys, corporation directors or officers, partners and joint adventurers. *In some relations the fiduciary element is more intense than in others; it is peculiarly intense in the case of a trust. It is the duty of a trustee to administer the trust solely in the interest of the beneficiaries.* He is not permitted to place himself in a position where it would

be for his own benefit to violate his duty to the beneficiaries."

Scott on Trusts, Vol. II, Sec. 170, p. 856 (1939).

A trustee may not delegate his trust (*Scott,* Vol. II, Sec. 171, p. 910), and he may not without permission of the Court resign as trustee. (*Scott,* Sec. 171.1, p. 910.)

To permit a trustee to shed his obligations to his beneficiary by the simple expedient of depositing the trust funds in court would be to vitiate the purpose and function of the law of trusts. If it be true, as plaintiff asserts, that at the first sign of an adverse claim, the trustee may drop his trust funds like a hot potato, and leave the beneficiary to fend for himself, the fundamental purpose of the trust relationship—protection of the beneficiary—has vanished into thin air.

Neither in Prof. Scott's definitive treatise on "The Law of Trusts" (and 1950 Supplement) above referred to, nor in Perry, "Trusts and Trustees" (7th Ed., 1929) is there claimed for the trustee the right to interplead his beneficiary with a hostile claimant. The absence of the assertion of such a right in the long history of interpleader and the longer history of the law of trusts is strong evidence of the fact that the asserted right does not exist. And for the plain reason that it is incompatible with the trustee's duty of loyalty to his beneficiary.

True it is, that if the beneficiary has effected a valid assignment of his interest in the trust, and the trustee pays the beneficiary after notice of such assignment, he will be liable to the assignee.

The trustee is not, however, left to squirm between the upper millstone of his trust obligation and the nether one of liability to the assignee. The well sanctioned right and duty of the innocent trustee in bona fide doubt as whom to pay is the petition for instructions. But in such action, unlike one in interpleader, the apprehensive trustee remains before the court and his administration of the trust is subject to scrutiny. As opposed, the trustee initiating an interpleader action, in the words of the District Judge in *Boice v. Boice, et al.,* 48 Fed. Supp. 183, 185 (D. C., D. N. J., 1943):

> *". . . deposits the leavings of the trust estate . . . with us; and desires that he may be permitted to abandon all these claimant defendants to pursue and battle with each other without his further helpful services . . ."*

The abandonment of the beneficiary implicit in the desire of the trustee to interplead him with a hostile claimant is the complete antithesis of the trust relationship.

As stated by Mr. Justice Cardozo in *Meinhard v. Salmon, et al.,* 249 N. Y. 458, 464, 164 N. E. 545, 546 (1928):

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honestly alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tra-

dition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions [citation omitted]. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court." (Quoted in *Scott on Trusts,* Vol. II, pp. 909, 910.)

(b) The foregoing argument is reinforced in the instant case, for as confessed by the plaintiff's law firm:

> "Recognizing Palomas Land and Cattle Company as our client and the Rasberry firm as a claimant of part of the funds of such client, we have determined to file this action in the District Court of Los Angeles."

An attorney in possession of his client's funds holds those funds as trustee and his duties and liabilities are those of a trustee. (7 C. J. S. 976; 5 Am. Jur. 285.)

The "very high degree of fidelity and good faith" (5 Am. Jur. 285) to a client required of members of the bar, is forcefully put in 7 Corpus Juris Secundum 987:

> "*. . . if other parties claim the fund, nothing but an injunction will justify the attorney in withholding payment*" [*to the client*].

III.

Both Plaintiff Trustee and the Adverse Claimant Have Acknowledged That It Would Be Improper for the Trustee to Pay Appellant's Trust Funds Directly to the Adverse Claimant and There Is Therefore Lacking a Bona Fide Basis for the Interpleader.

1. Contention of the Defendant Rasberry.

(a) It is submitted that there is a *complete* absence of support in the record for the italicized portion of the trial court's finding, reading:

> "Defendant law firm contends that said letter agreement dated August 6, 1943, constituted an assignment cognizable *either at law or* . . ." etc. [Finding of Fact IV, Tr. p. 190.]

(b) In his own words, the adverse claimant contends that by the execution of said letter:

> "15% of the Palomas share under the Trust Agreement . . . was assigned in equity . . ." [Rasberry Aff., Tr. p. 43.]

> ". . . as security for its said fee for legal services rendered defendant Palomas." [Rasberry Aff., Tr. p. 34.]

(c) And he now claims by reason of that alleged equitable assignment a right to be paid those monies, not by Appellant, but directly by the plaintiff trustee out of Appellant's trust funds:

> "It is our position that the Contract dated August 6, 1943 . . . entitles us to the delivery of these funds direct to us." [Rasberry letter to plaintiff, Ex. No. 34 to Baldwin Aff., Tr. p. 156.]

2. Appeal Not Concerned With Issue on the Merits.

This appeal is not concerned with the merits of the controversy between the two defendants, to wit:

(a) Is defendant Rasberry entitled to be paid any attorney's fees by Appellant? and

(b) Does the alleged agreement of August 6, 1943, in fact constitute an equitable assignment to defendant Rasberry?

See:

U. S. et al. v. Sentinel Fire Ins. Co., et al., 178 F. 2d 217, 233 (C. C. A. 5th, 1949).

3. The Narrow Issue.

By denying plaintiff's right to bring the action at all, Appellant here asserts that at the time he filed suit:

(a) Plaintiff knew that there was not and could not be a *bona fide* claim by defendant Rasberry to direct payment by the trustee; and

(b) Plaintiff had no *bona fide* doubt as to whether he should pay his beneficiary-client's trust funds to the adverse claimant.

4. The Trustee Has Already Rejected the Precise Claim Here Made.

(a) On May 31, 1947, the defendant Rasberry requested the trustee to make direct payment:

"As you know, our firm is entitled to 15% of the proceeds due Palomas Land and Cattle Company as attorney's fees. *Accordingly, for convenience, we respectfully request that in disbursing the amount due Palomas Land & Cattle Company you make two checks, one for 15% of the amount, payable to this*

firm, and one for the balance payable to Palomas Land & Cattle Company." [Tr. pp. 107-108.]

(b) At the time that letter was received by the plaintiff, plaintiff had before him the document constituting the so-called "equitable assignment." [Aff. of Baldwin, Tr. p. 76.]

(c) And at the time this suit was filed, plaintiff had before him no other evidence of an equitable assignment than was in his possession on May 31, 1947. Thus, in reply to a request from counsel for Appellant, plaintiff's firm advised on *February 6, 1950:*

> "Recently we furnished you with a copy of a certain agreement between Palomas Land & Cattle Company and Burges, Scott, Rasberry & Hulse which we have construed to constitute an equitable assignment in the recovery of any proceeds of the claim. *We have no other document in the form of an assignment.*" [Tr. p. 152.]

(d) Despite possession of the alleged equitable assignment, the trustee rejected defendant Rasberry's request for direct payment on the same grounds here asserted by Appellant, to wit: That such payment would be contrary to the trust. On June 3, 1947, the trustee wrote defendant Rasberry:

> "Relative to the disbursement of the proceeds of the voucher: *You will recall that the distribution of the funds is to be made in accordance with the terms of the contract of October 29, 1943,* by and between Palomas Land & Cattle Company, Security-First National Bank of Los Angeles, and the partnership of Garfield, Baldwin & Vrooman." [Tr. p. 112.]

5. The Adverse Claimant Recognized That the Claim to Direct Payment Is Improper.

In reply to the trustee's advice that direct payment, *i. e.,* by separate check, could not be made in view of the terms of the trust, defendant Rasberry wrote the trustee on *June 4th, 1947:*

> *"I do, of course, recall that the distribution of the funds is to be made in accordance with the terms of the contract of October 29, 1943.* However, my confidential letter accompanying the voucher will explain our position and of course so long as Palomas Land & Cattle Company is joint payee in the check evidencing our attorneys' fees you are taking no responsibility for the matter. In any event, we will appreciate your handling the matter in the manner suggested." [Tr. pp. 113-114.]

Thus defendant Rasberry encouraged the trustee to make payment in a form which would give Rasberry some hold over a portion of the funds (which matter is discussed *infra* at page 38 of this brief), *but at the same time acknowledged that direct payment to him by the plaintiff was improper, and "that the distribution of the funds is to be made in accordance with the terms of the contract."*

6. The Action Is Not Brought in Good Faith.

As demonstrated above, both the plaintiff and the adverse claimant have condemned themselves by their own words. Each has stated that the trust funds are to be paid out in accordance with the terms of the trust, *i. e.,* to Appellant, the exact reverse of the alleged basis of the interpleader.

Where the plaintiff has said in effect, "I have no doubt that the adverse claim is wrong," and the adverse claimant has said in effect "I agree," must it not be conceded that an action asserting there to be such a doubt is brought in bad faith?

> *"If plaintiff knows to which of the claimants he can rightfully or safely pay, and thus protect himself, or if the hazard to which he conceives himself to be exposed has no reasonable foundation, he cannot maintain this equitable remedy."*

Calloway v. Miles,[7] 30 F. 2d 14, 15 (1929) (C. C. A. 6th);

Mutual Life Ins. Co. of N. Y. v. Egeline, et al., 30 Fed. Supp. 738, 740, 741 (1939), D. C., N. D. of Calif. N. D.;

See:

American United Life Ins. Co. v. Luckman, et al., 21 Fed. Supp. 39, D. C., S. D. of Calif. C. D. (1937).

On such a record, interpleader cannot be permitted. As stated in *Fleischmann v. Mercantile Trust Co., etc. et al.,* ..... Md. ....., 65 A. 2d 182, 184 (1949):

> "To recognize mere fear of suit as a ground of suit would pervert equity jurisdiction from preventing to causing multiplicity of suits."

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[7]Criticized in *National Fire Ins. Co. v. Sanders, et al.,* 38 F. 2d 212, 214 (1930), C. C. A. 5th, but followed in the Ninth Circuit, *Mutual Life Ins. Co. of New York v. Egeline, et al., supra.*

7. Was There Ever a Bona Fide "Demand" Made Upon the Trustee?

As a matter of fact, even after defendant Rasberry felt that Appellant would insist on being paid all that was coming to it under the terms of the trust, he still did not "demand" *direct payment* from the trustee.

He *requested* the trustee to continue to disburse funds via a *joint check to Appellant and defendant Rasberry—not by separate check to defendant Rasberry.* [Letter of Rasberry, Tr. pp. 144-145.]

It was not until February 6, 1950, that defendant Rasberry made any "demands" at all—and then there was asserted for the first time a right to direct payment. [Letter of Rasberry, Tr. pp. 155-156.]

Under what circumstances was this so-called "Demand" made?

(1) The lengthy affidavit of the defendant Rasberry is completely silent with respect thereto. [Aff. of Rasberry, Tr. pp. 29-68.]

(2) The body of the lengthy affidavit of plaintiff merely recites the receipt of the letter of February 6, 1950, "from John L. Rasberry *formally* demanding" 15% of Appellant's share of the sixth installment. [Aff. of Baldwin, Tr. p. 83.]

(3) The letter of February 6, 1950, from defendant Rasberry to plaintiff [Ex. 34 to Aff. of Baldwin, Tr. p. 155] indicates that trustee and adverse claimant corresponded with each other before there was any *"formal demanding":*

"Supplementing my letter of *January 31, 1950,* and in further response to *your letter* of January 26,

1950, beg to formally demand . . ." [Letter of Rasberry to plaintiff's firm, Tr. p. 155.]

The trustee, under a fiduciary duty of full disclosure to beneficiary and Court, saw fit to file an affidavit with 37 exhibits covering 97 pages of transcript, and likewise saw fit not to reveal to beneficiary or court the letters of January 26, 1950, and January 31, 1950, which would have advised of the circumstances of the Rasberry "demand."

The adverse inference must be drawn from a failure to produce documents in the trustee's possession.

Code of Civil Procedure, Section 1963(5)(6).

The trustee's only advice to Appellant concerning the "demand" was that there had been a demand for a joint check to Appellant and defendant Rasberry. [Ex. 36, Tr. p. 163.] It was only by the filing of suit that the trustee ever advised Appellant of the true nature of the "adverse claim."

8. Conclusion Re Bad Faith.

It is submitted that in view of the foregoing, it must be concluded that the suit is brought in bad faith and in violation of the trustee's high duty of loyalty to his beneficiary. Even if it be thought that a trustee have any right to interplead his beneficiary with a hostile claimant (see Point II, Br. pp. 23 to 30), the right in principle could in any event exist, only after complete disclosure to the beneficiary, only in cases where there was a well-grounded doubt as to the trustee's duty, and certainly only where the trustee knew that the adverse claim was asserted *bona fide*. None of these conditions exist in the present case.

IV.

In Violation of His Fiduciary Duty, the Plaintiff Trustee Concealed From the Beneficiary the Hostile Intentions of the Adverse Claimant for Almost Three Years, and May Not Now Force His Beneficiary to Interplead With the Adverse Claimant.

1. The "Confidential" Letter.

The defendant Rasberry's original request to the trustee for direct payment (*i. e.,* separate check), on May 31, 1947 [Tr. pp. 107, 108] was stated to be *"for convenience."* There was no assertion of a *right* to direct payment. The letter indicated on its face that a copy of the letter was going forward to the President of Appellant.

Each of the letters from defendant Rasberry to the trustee in connection with the vouchers for subsequent payment, requested joint checks—but again in each instance—*"for convenience."* [Tr. pp. 119, 125, 133.] There was no assertion of any right to direct payment. Each of these letters indicated on their face that a copy of the letter was going forward to the President of Appellant or her personal representative.

However, accompanying the "for convenience" letter of May 31, 1947, was another and different sort of letter to the trustee, this one marked *"Confidential," i. e., not for the eyes of the beneficiary.* That letter [Ex. 11 to Baldwin Aff., Tr. pp. 108, 109] read as follows:

"May 31, 1947

"Confidential

Mr. James R. Garfield,
Garfield, Baldwin, Jamison, Hope & Ulrich,
1425 Guardian Building,
Cleveland 14, Ohio

Dear Mr. Garfield:

You will note my request in the attached letter that you divide the portion to which Palomas is entitled into two parts, one for our attorney's fee of 15% and the other for the balance. We have no objection to the check evidencing our attorney's fees being payable to Palomas Land and Cattle Company as joint payee, but we do desire our firm named as a payee therein. In support thereof, we attach hereto photostat copy of our contract with Palomas Land and Cattle Company for your records and so that you, as Trustee, are advised of our interest in the portion belonging to Palomas Land and Cattle Company. We do not anticipate any argument about the matter for our portion thereof was paid without question during Marshall's lifetime. However, Marshall is dead and something may happen to me. *Therefore, I want to get this set up so that there is a record thereof on file with you and so that our attorney's fees can be segregated by the Trustees.*

"My wife and I plan to attend the meeting of the American Bar Association in Cleveland in September

of this year and we are looking forward to seeing you at this time.

"With kind personal regards and best wishes, beg to remain

"Yours sincerely,

/s/ J. L. RASBERRY,
J. L. RASBERRY."

This "confidential" letter plainly indicated to the trustee:

(i) That Appellant's *attorney* was communicating matters to Appellant's *trustee* and *attorney* which (a) affected the beneficiary and client, and (b) were intended to be concealed from the beneficiary and client;

(ii) That the trustee was being asked to participate in a scheme by the other attorney "to get this set up", to make "a record" for the other attorney to use against the beneficiary, certainly not for the beneficiary; and

(iii) That the trustee was being asked to have the fees of the other attorney "segregated by the trustee", *i. e.,* that the beneficiary's other attorney was asserting some claim to a portion of the beneficiary's funds.

While the trustee rejected the claim for direct payment [Tr. p. 112], he gave no indication to his beneficiary of the hostile intentions of the beneficiary's trusted lawyer.

Again, under date of June 4, 1947, the trustee received further notice that the beneficiary's other attorney had assumed a position adverse to the beneficiary-client, and was again being asked to assist the attorney—not the beneficiary:

> "I do, of course, recall that the distribution of the funds is to be made in accordance with the terms of the contract of October 29, 1943. However, my confidential letter accompanying the voucher will explain our position and of course so long as Palomas Land and Cattle Company is joint payee in the check evidencing our attorneys' fees you are taking no responsibility for the matter. In any event, we will appreciate your handling the matter in the manner suggested.
>
> "If you have not received the voucher by the time you receive this letter, advise me, and I will undertake to trace the original letter and voucher." [Rasberry's letter to plaintiff's firm, Tr. pp. 113-114.]

In response to this letter, while still refusing to make direct payment of the beneficiary's funds to defendant Rasberry, the trustee issued a joint check to Appellant and defendant Rasberry in the amount of the claimed attorney's fees,

> "The two checks, *representing the Palomas Land & Cattle Company's share,* are enclosed, and I trust that the manner of issuance will meet *your requirements.*" [Plaintiff's letter to Rasberry, Tr. p. 115.]

2. Duty of Plaintiff Trustee to Inform Appellant Beneficiary.

Having obtained information that the Appellant's attorney (Rasberry) was acting in his own interest rather than in the interest of the client-beneficiary, and made aware by the "Confidential" letter that this adverse attitude was concealed from the beneficiary, it was the immediate duty of the trustee to communicate this knowledge to the Appellant beneficiary-client. As put in the Restatement of the Law of Trusts, Vol. I, Sec. 173 *"Duty to Furnish Information,"* Comment d, p. 448:

> "Even if the trustee is not dealing with the beneficiary on the trustee's own account, he is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest . . ."

Having failed in that duty, the trustee—under an independent liability to his beneficiary for breach of trust—does not enter this Court or the District Court with clean hands, and the powers of a court of equity will not be exercised on his behalf.

> *Boice v. Boice, et al.,* 48 Fed. Supp. 183, 186, D. C., D. N. J. (1943); aff'd 135 F. 2d 919, C. C. A. 3rd (1943).

V.

The District Court Erred in Awarding Plaintiff Attorney's Fees and Costs for the Reason That:

(1) Explicit Language of the Trust Agreement Prohibits Plaintiff From Charging the Trust With Any Expense; and

(2) The Applicable Law Prohibits an Award of Attorney's Fees.

1. The Provisions of the Trust Agreement Reading: "The Trustees Shall Execute This Trust Without Charge. No Expenses Shall Be Incurred Without First Obtaining the Written Approval of Palomas and Bank," Bars an Award of Attorney's Fees or Costs to the Plaintiff.

Not one shred of evidence was presented to the District Court indicating that either—let alone both—of the two beneficiaries of the trust—Appellant and the Security-First National Bank of Los Angeles—had consented in writing or otherwise to an award to plaintiff of attorney's fees and costs out of the trust *res*. Appellant's president stated that no consent had ever been given to the institution or maintenance of the action and that the same constituted a breach of the trust agreement. [Aff. of Metcalf, Tr. p. 18.] The above quoted terms of the trust [Tr. p. 86] positively forbid any expense or charge against the trust, and:

> "It is the duty of the trustee to conform strictly to the directions contained in the trust instrument . . ."
>
> 25 *Cal. Jur.* 332.

That the provision of the trust agreement barring charge or expense was judiciously and not unreasonably arrived at is indicated by the fact that the trustee himself under the agreement is to receive 5/19ths [Tr. p. 86] of an award totaling $1,686,056.00. [Tr. pp. 70, 71.]

The award of attorney's fees and costs is plainly contrary to the law which the parties have made for themselves, *i. e.,* the trust agreement.

2. The Applicable Law Prohibits an Award of Attorney's Fees.

(a) Law of the Forum Governs.

There is nothing in the Act (28 U. S. C. A. Sec. 1335) itself which confers a right to attorney's fees to the interpleader. And even if it were thought that the language of the trust were not controlling, the applicable law nonetheless bars the award.

The rule of *Erie Railway Company v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), has been interpreted in *Guaranty Trust Co. v. York,* 326 U. S. 99, 89 L. Ed. 2079, 65 S. Ct. 1464 (1945), to require federal courts administering equitable remedies to follow state decisions affecting such remedies.

Accordingly, it is held that in actions under the Act, a federal court is bound to deny attorney's fees to the interpleader where the state law of the forum denies such an award.

Danville Bldg. Assn. of Danville, Ill. v. Gates, et al., 66 Fed. Supp. 706, D. C., E. D. Ill. (1946);

Ill. Bankers Life Assur. Co. v. Blood, et al., 69 Fed. Supp. 705, 707, D. C., N. D. Ill., E. D. (1947).

The reason for the rule is well stated in the *Danville* case, *supra,* at page 709. In denying attorney's fees to the interpleader, the Court states:

> "We are not dealing with a federal right. We are dealing with the rights of citizens in Illinois where the State rule denies the allowance of attorneys fees. No federal question is involved. This Court has jurisdiction of the suit merely because congress has seen fit to extend the jurisdiction to cases defined by the Act."

(b) Law of the Forum Bars Attorney's Fees.

The state law of the forum in the instant case bars any award of attorney's fees to the plaintiff in interpleader.

The California rule is stated in *Pacific Gas and Electric Co. v. Nakano, et al.,* 12 Cal. 2d 711, 715, 87 P. 2d 700 (1939):

> *"It is well settled in this state that an allowance of an attorney's fee in favor of a plaintiff in an interpleader action is improper and is without authority of law."*

3. Conclusion Re Attorney's Fees and Costs.

(a) If, as Appellant contends, the entire action is improperly brought, clearly no attorney's fees or costs may be awarded; and

(b) Further, the law the parties created for themselves —the express terms of an express trust—bars attorney's fees and costs; and

(c) In any event, the applicable State law bars attorney's fees to the interpleader.

VI.
Conclusion.

The courts must be vigilant to defeat every attempt to lower the high standards of conduct required of trustees. The intense duty of loyalty owed by the trustee to his beneficiary is inconsistent with the plaintiff's endeavor to abandon his beneficiary and force interpleader with a hostile stranger. Especially is this true where there is no *bona fide* doubt as to the rightful disposition of the trust funds, the trustee and adverse claimant having conceded that the claim is improper. The impropriety of the interpleader in the instant case is further demonstrated by the action of the trustee in co-operating with the adverse claimant to conceal the adverse claim for almost three years. Finally, attorney's fees and costs are emphatically barred by the terms of the trust, and an award of attorney's fees to the plaintiff in interpleader is expressly forbidden by the applicable California law.

The judgment should be reversed with directions to dissolve the injunction, dismiss the action, and order the return of the attorney's fees and costs.

Respectfully submitted,

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